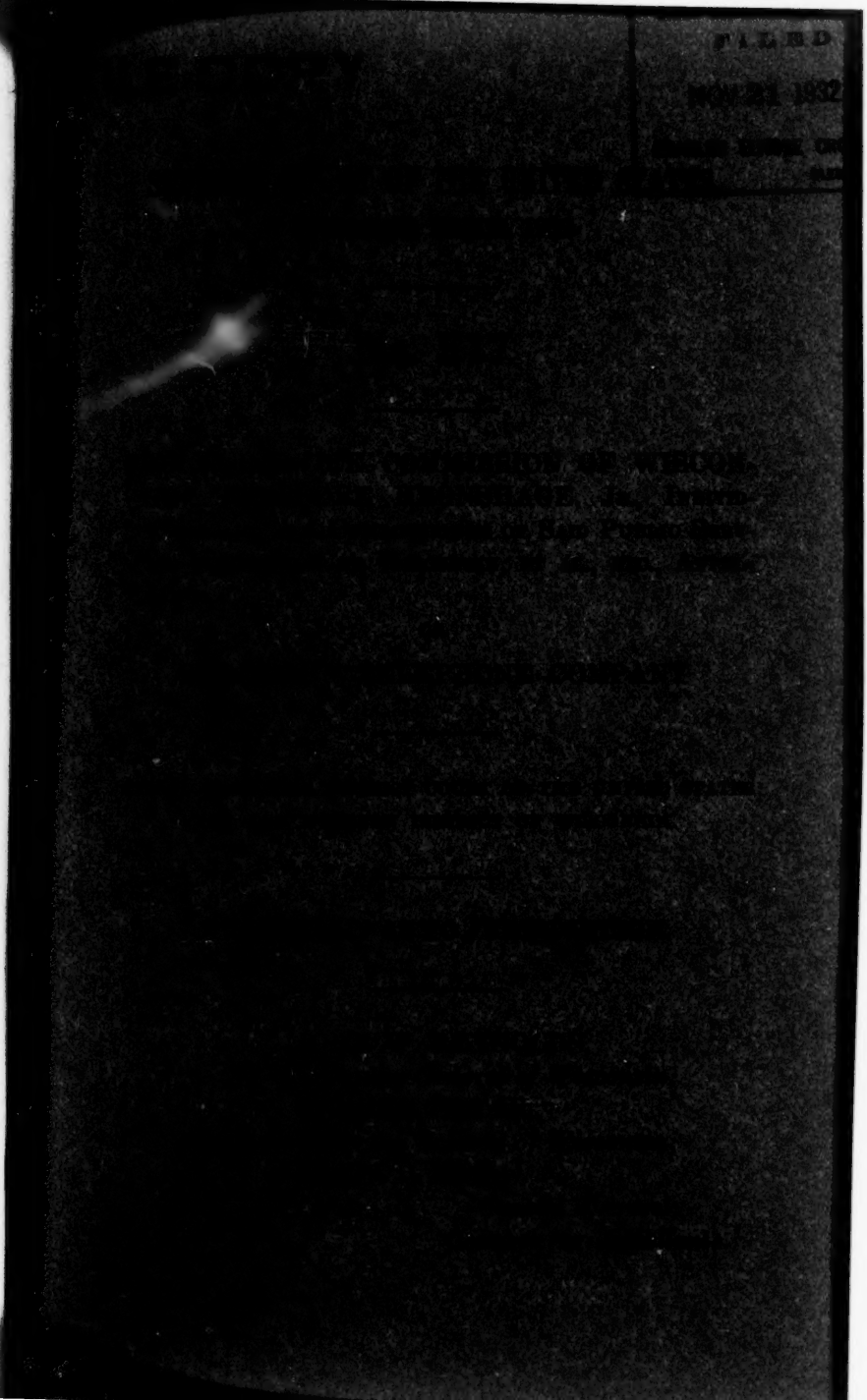

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 517

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, JR., INDIVIDUALLY AND AS A COMMISSIONER OF SAID PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., ETC., APPELLANTS,

vs.

WISCONSIN TELEPHONE COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

In Equity. No. 2118.

WISCONSIN TELEPHONE COMPANY, a Wisconsin Corporation, Complainant,

vs.

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE Kronshage, Jr., individually and as a Commissioner

of said Public Service Commission of Wisconsin; A. R. McDonald, individually and as a Commissioner of said Public Service Commission of Wisconsin; David E. Lilienthal, individually and as a Commissioner of said Public Service Commission of Wisconsin; William M. Dinneen, individually and as Secretary of said Public Service Commission of Wisconsin, and John W. Reynolds, individually and as the Attorney General of Wisconsin, Defendants.

Statement as to Jurisdiction of the Supreme Court of the United States Including "A Showing of the Matters in Which it is Claimed that the Court has Abused Its Discretion in Granting * * * the Interlocutory Injunction."

Pursuant to Rule 12 of the Supreme Court of the United States, as amended May 31, 1932, effective September 1, 1932, defendants submit their statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the decree entered herein by the statutory court, including in such statement "a showing of the matters in which it is claimed that the court has abused its discretion in granting * * * the interlocutory injunction."

A.

Statement of Jurisdiction of the Supreme Court.

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

Defendants submit that sections 345 and 380 of Title 28, United States Code (sections 238 and 266, Judicial Code) sustain the jurisdiction of the Supreme Court of the United States on this appeal. These sections provide as follows:

Section 345. (Section 238, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936.)

> "A direct review of the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise.
>
> * * * * * * *
>
> (3) Section 380 of this title.
>
> * * * * * * *"

Section 380. (Section 266, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936.)

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made

by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such

temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II.

State Administrative Order Involved.

The suit of Wisconsin Telephone Company, complainant, is not to enjoin a State statute but is to enjoin an order of the Public Service Commission of Wisconsin, entitled "Opinion and Order, Decided June 30, 1932" and further designated "In the Matter of the State-Wide Investigation on the Commission's Own Motion of the Rates, Rules, Services, Practices and Activities of the Wisconsin Telephone Company".

This opinion and order consist of ten pages of synopsis, 156 pages of text and a glossary of terms. *Forty printed copies of said Opinion and Order are being tendered herewith to the Clerk of the District Court,* available for forwarding to the Clerk of the Supreme Court of the United States.

The order reduces certain telephone rates of the Wisconsin Telephone Company, complainant, by 12½%. The order is a temporary order and will expire by its own terms on July 31, 1933, unless sooner revoked or modified by the Commission.

III.

Date of Decree and Date of Application for Appeal.

The decree which defendants seek to have reviewed by the Supreme Court of the United States, is dated as of September 21, 1932, and was filed and entered on October 18, 1932. The petition for appeal was presented on October 21, 1932.

IV.

Statement Showing That the Nature of the Case and of the Rulings of the Court is such as to Bring the Case Within the Provision of Section 266 of the Judicial Code.

Wisconsin Telephone Company, complainant, is a duly organized and existing Wisconsin corporation engaged in the public utility business in the State of Wisconsin. On June 30, 1932, the Public Service Commission of Wisconsin issued its order herein enjoined, reducing certain rates of the complainant company by 12½%. On July 28, 1932, complainant filed its bill of complaint in equity in the District Court of the United States for the Western District of Wisconsin, in which it is alleged that the rates established by said order of the Public Service Commission are confiscatory, that said order deprives complainant of its property without due process of law and denies the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States; and makes other allegations.

The bill of complaint prays that the defendants be enjoined and restrained perpetually and also during the pendency of the suit from attempting to compel complainant to observe the rates prescribed by said order of defendant Public Service Commission and from taking any steps or proceedings to enforce said order, and for a temporary restraining order pending the hearing and determination of the application for an interlocutory injunction.

On July 30, 1932, the District Court of the United States for the Western District of Wisconsin, the Honorable F. A. Geiger, District Judge, granted a temporary restraining order.

On September 21, 1932, a hearing on the interlocutory injunction was had before the Honorable George T. Page, Circuit Judge, the Hon. F. A. Geiger and the Hon. Louis FitzHenry, District Judges, pursuant to section 266 of the Judicial Code.

On this same date, namely, September 21, 1932, an opinion was delivered from the bench as follows: Hon. George T. Page:

> "The opinion of the Court is that under the circumstances here shown the injunction should be granted, and is granted."

On October 18, 1932, a decree for interlocutory injunction, dated as of September 21, 1932, was filed and entered, signed by the said judges of the statutory court, enjoining and restraining the defendants, until the final hearing and determination of this suit, from attempting to compel complainant to observe or put in force the rates for telephone service prescribed by the order of the defendant Public Service Commission of Wisconsin, dated June 30, 1932, and also enjoining and restraining said defendants, until the final hearing and determination of this suit, from taking any steps or proceedings against complainant to enforce said order.

It appears from the foregoing recital that an application was made to the District Court of the United States for the Western District of Wisconsin, for a temporary restraining order, an interlocutory injunction pending the trial, and a permanent injunction

enjoining and restraining defendants, as State officers, from enforcing or executing an order made by an administrative board acting under and pursuant to the statutes of the State of Wisconsin. A temporary restraining order was granted and an interlocutory injunction was granted, and it is from this decree for an interlocutory injunction entered by the three judges comprising the statutory court, that this appeal to the Supreme Court of the United States is taken. The appeal therefore is one which is governed by the provisions of section 266 of the Judicial Code.

V.

Cases Believed to Sustain Jurisdiction of the Supreme Court of the United States to Review on Appeal the Decree Herein.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 293.

Pendergast v. *New York Telephone Co.*, 262 U. S. 43, 47.

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133.

Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 249.

Moore v. *Fidelity and Deposit Co.*, 272 U. S. 317, 321.

Ex parte Buder, 271 U. S. 461, 465.

Chicago Great Western Railway Co. v. *Kendall*, 266 U. S. 94.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction to review the decree for interlocutory injunction entered by the statutory court herein.

"Showing of the Matters in Which it is Claimed that the Court has Abused Its Discretion in Granting * * * the Interlocutory Injunction."

This is an appeal from an interlocutory decree of a specially constituted District Court of the United States (Judicial Code, sec. 266) and defendants accordingly include the following "showing of the matters in which it is claimed that the court has abused its discretion in granting * * * the interlocutory injunction", this being pursuant to Rule 12 of the Supreme Court of the United States, recently promulgated, effective September 1, 1932.

The matters in which the defendants claim that the court has abused its discretion are the following:

I.

It was an abuse of discretion to allow the interlocutory injunction without making even a prima facie determination of the facts and/or law which constitute confiscation.

The opinion of the court on September 21, 1932, when the hearing was held and the interlocutory injunction announced from the bench, is in one sentence, to-wit:

> "The opinion of the court is that under the circumstances here shown the injunction should be granted, and is granted."

The opinion finds no facts and determines no law. The decree, filed and entered October 18, 1932, adds nothing to the prior opinion in finding facts or determining law. The decree merely asserts *nunc pro tunc* that there was confiscation. The substantive portion of the decree is a single paragraph, which is part of a sentence, to-wit:

> "This cause came on to be heard on this 21st day of September, 1932, before this Court duly convened in accordance with the provisions of the statutes applicable thereto upon the application of the complainant for an interlocutory injunction and upon the verified bill of complaint herein and the verified answer thereto and the affidavits filed herein by the complainant and defendants, respectively, and the complainant appearing by Edwin S. Mack and Frederic Sammond, its solicitors, and the defendants appearing by John W. Reynolds, Attorney General, Samuel Bryan, Assistant Attorney General, and Alvin C. Reis, Special Counsel, their solicitors, and said motion having been argued by counsel and the court finding that an interlocutory injunction should issue because the rates for telephone service prescribed by the order of the defendant Public Service Commission dated June 30, 1932, described in the complaint and hereinafter referred to, would result in the confiscation of the property of said complainant devoted to telephone service and that the compulsion of the maintenance of said rates would deprive the complainant of property without compensation and without due process of law, in violation of the Constitution of the United States,

and that irreparable injury to complainant will result unless an interlocutory injunction issue as prayed by the complainant,

"NOW, IT IS HEREBY ORDERED AND DECREED * * *"

II.

It was an abuse of the discretion to grant the interlocutory injunction arbitrarily without the "hearing and determination" required by section 266 of the Judicial Code.

The opinion and order of the Public Service Commission of Wisconsin, herein enjoined, cover a ten page synopsis, 156 pages of printed text and a glossary of terms. The Commission had worked on the case preparatory to the order for eleven months.

The record before the Commission consisted of over 2,000 typewritten pages of testimony and 83 exhibits at the time its order was issued and over 2,400 typewritten pages of testimony and 94 exhibits at the time the statutory court convened. The so-called Madison record, which was incorporated into the record upon which the Commission's order was based, included in addition 1,400 typewritten pages of testimony and 153 exhibits.

The bill of complaint of the complainant in court consisted of 21 printed pages, 8x11, plus divers exhibits, including its petition for rehearing before the Commission, which included 32 such printed pages and embraced 47 paragraphs and miscellaneous sub-paragraphs.

The answer of the defendants covered 25 printed pages, 8x11, plus a copy of the Commission's order denying rehearing before the Commission. *Every material allegation of the bill of complaint was specifically answered.*

Complainant's main affidavits on the application for interlocutory injunction, including its affidavits on the temporary restraining order, embraced 125 printed pages, 8x11.

Defendants' main affidavits on the application for interlocutory injunction embraced 88 printed pages, 8x11.

Complainant's reply affidavits on the application for interlocutory injunction embraced 68 printed pages, 8x11.

Defendants' reply affidavits on the application for interlocutory injunction embraced 29 printed pages, 8x11.

The complainant also introduced exhibits as part of its affidavits on application for interlocutory injunction, which exhibits are contained in a volume, 10x16 inches, including statistical tables, price trend charts, indices, balance sheets, income statements, contracts between Wisconsin Telephone Company and American Telephone and Telegraph Company and Western Electric Company, Inc., and data of many descriptions, covering roughly 150 pages.

The consideration which the court gave to the 156 page opinion and order of the Commission, to the pleadings, to the some 450 pages of affidavits and exhibits attached thereto, was the following:

These papers were laid before the three members of the court for the first time at 10:30 a. m. on September 21, 1932, (except insofar as the District Judge, Honorable F. A. Geiger, had access, on the application for a temporary restraining order, to the bill of complaint and complainant's affidavits in support of the application for temporary restraining order only.)

The court took up the case at 10:30 a. m. on September 21, 1932, and was through with the case shortly after 3:00 p. m. on the same day, having taken three recesses in the meantime, one of them for an hour and a half at lunch.

The presiding judge twice announced from the bench that the members of the court would have to leave by four o'clock.

The court did not take the matter under advisement. The interlocutory injunction was granted from the bench.

There was a lack of the "adequate hearing and full deliberation" contemplated by section 266 of the Judicial Code.—*Stratton* v. *St. Louis Southwestern Railway Company*, 282 U. S. 10, 14.

III.

It was particularly an abuse of discretion to thus summarily enjoin the Commission's order, because the interlocutory injunction in this case has the effect of a permanent injunction.

The Commission's order, herein enjoined, was a temporary order intended to be effective August 1, 1932, and *to expire by its own terms not later than July 31, 1933.*

On September 21, 1932, when the court announced from the bench that the interlocutory injunction would issue, counsel for the complainant company stated that the company could not prepare a valuation and go to trial on the merits of the permanent injunction for at least *six more months*, and then only on the assumption that the Commission would accept the company's plant measurement records, which the Commission is unwilling to do, its solicitors are informed, because it considers said records inaccurate.

These circumstances mean that the Commission's order will *expire* before a hearing on the permanent injunction can be completed or, indeed, even begun.

To enjoin, by interlocutory decree, the Commission's order under such circumstances is in effect to impose a permanent injunction, with such inadequate consideration as to represent an aggravated abuse of discretion.

IV.

It was an abuse of discretion for the court to issue an interlocutory decree which does not reserve to the defendant Public Service Commission any power to make the rate reduction, herein enjoined, by way of a permanent order after completion of its investigation and after the temporary order, herein enjoined, shall have expired by its own terms on July 31, 1933.

The order of the Public Service Commission of Wisconsin, dated June 30, 1932, herein enjoined, is a temporary order, based on eleven months' prior investigation. The order is effective August 1, 1932. The

order will expire, by its own terms, by July 31, 1933. The investigation is continuing. By July 31, 1933, the Commission will have completed twenty-four months of investigation, and the temporary order, as noted, will have expired.

The decree not only restrains the Commission from enforcing this particular *order* based on the eleven months of investigation, but also enjoins the *rate schedule as such*, which means that if, *after the enjoined temporary order has by its own terms expired*, the Commission should find itself justified in making the same rate reduction based on *twenty-four* months of investigation, it would not have the administrative power to do so without being in contempt of court, assuming that the injunction in the present suit was still a pending matter at that time, which is most likely.

Dated October 21, 1932.

Respectfully submitted,
JOHN W. REYNOLDS,
Attorney General of Wisconsin;
SAMUEL BRYAN,
Assistant Attorney General of Wisconsin;
ALVIN C. REIS,
Special Counsel,
Solicitors for Defendants.

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